Nos. 428, 429

In the Supreme Court of the United States

OCTOBER TERM, 1951

PENNSYLVANIA WATER & POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION ET AL.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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OPINIONS BELOW

The main opinion of the Federal Power Commission, issued on January 5, 1949, directing a rate reduction (R. XVI, 39–191)[1] is reported at

[1] The record in these cases consists of eighteen printed volumes and several unprinted volumes of transcripts and exhibits. We will use Roman numerals to refer to volumes and arabic numbers to refer to pages. Thus (Tr. VI, 73) and (R. XVI, 91) will indicate page 73 in volume six of the unprinted transcript and page 91 of volume sixteen of the printed record, respectively.

82 PUR(NS) 193. Its opinion of February 28, 1949, denying rehearing (R. XVI, 372–388) is reported at 82 PUR(NS) 286, and its opinion order, issued October 27, 1949, rejecting proposed tariffs and prescribing the rate schedules prescribed (R. XVII, 46–71) is not yet reported. The opinions of the Court of Appeals for the District of Columbia Circuit (R. XVIII, 46–72, 81–98) are not yet officially reported.[2]

JURISDICTION

The judgment of the Court of Appeals in these cases was entered on July 3, 1951 (R. XVIII, 73–74). Petitioners' applications for rehearing, seasonably filed, were denied on September 6, 1951 (R. XVIII, 78). The petitions for writs of certiorari were filed on November 16, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and under Section 313 (b) of the Federal Power Act.

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[2] Additional opinions here relevant are: (1) The opinions of the Court of Appeals for the Fourth Circuit in *Pennsylvania Water & P. Co.* v. *Consolidated G., E. L. & P. Co. of Baltimore*, 184 F. 2d 552 (C. A. 4), certiorari denied, 340 U. S. 906, 186 F. 2d 934 (C. A. 4) (the first *Consolidated* case), which appear at R. XVIII, 1–28, 35–40; (2) the opinion of the District Court for the District of Maryland in *Pennsylvania Water & P. Co.* v. *Consolidated G. E. L. & P. Co. of Baltimore*, 97 F. Supp. 952 (the second *Consolidated* case), which appears at R. XVIII, 40–46, and the opinion on appeal of the Court of Appeals for the Fourth Circuit, decided January 3, 1952, copies of which have been made available to the Court by the petitioners.

QUESTIONS PRESENTED

1. Petitioners seek to raise the question as to whether the Federal Power Commission may prescribe contractual arrangements adjudged by the Fourth Circuit to violate the antitrust laws and the laws of Pennsylvania, or provisions premised upon such unlawful arrangements (Pet. in No. 428, p. 17). We do not believe that the case presents any such question, inasmuch as the Commission has not entered any order prescribing or premised upon arrangements adjudged unlawful.

2. Whether Penn Water's wholesale sales to its electric utility customers in Pennsylvania are, in the circumstances of this case, in interstate commerce.

3. Whether interstate wholesale rates of Penn Water, which both owns and operates facilities for the transmission and sale for resale of electric energy in interstate commerce and holds a license under Part I of the Federal Power Act, are, in the circumstances of this case, regulable by the Federal Power Commission under the rate regulation provisions of both Part I and Part II of the Act. We do not believe the case presents the question raised by petitioners as to inconsistency between the two Parts, and repeal of Part I *pro tanto* by the subsequently enacted Part II.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 803, 838, 16 U. S. C. 791a, *et seq.*) appear in the pamphlet copy of the Act submitted with this memorandum.

STATEMENT

These cases were instituted by the filing under Section 313 (b) of the Federal Power Act of three petitions for review of two orders of the Federal Power Commission (FPC) in the Court of Appeals for the District of Columbia Circuit. Two of the petitions, one filed jointly by Susquehanna Transmission Company of Maryland[3] and Pennsylvania Water and Power Company (Penn Water) on April 22, 1949, and the other filed by the Pennsylvania Public Utility Commission (Pennsylvania Commission) on April 25, sought review of an FPC order, issued January 5, 1949, requiring Penn Water to reduce, effective February 1, 1949, its interstate wholesale rates and charges for electric energy by approximately $2,000,000 annually. The third petition was filed by Penn Water on February 8, 1950, seeking re-

[3] Because of doubts respecting Penn Water's right to own and operate facilities in Maryland, Susquehanna Transmission Company of Maryland was created as a wholly owned subsidiary of Penn Water to own part of Penn Water's transmission facilities located in that state. By virtue of its arrangements with Penn Water, Susquehanna has no separate rates and charges. The references to Penn Water in this brief generally include Susquehanna.

view of the FPC order, issued October 27, 1949, rejecting rate schedules proposed by Penn Water in alleged compliance with the January 5 order and prescribing rate schedules to effectuate those rate reductions. While these petitions were pending before the court below, petitioners filed motions to annul the FPC orders on the ground that the contract between Penn Water and Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated), on which these orders were allegedly based, had been invalidated as violative of the federal antitrust laws and the laws of Pennsylvania in a private suit between the parties.[4] The court below (one judge dissenting) denied the motions to annul and affirmed the FPC orders. The facts pertinent to the issues here involved may be summarized as follows:

Penn Water: Penn Water, a corporation organized under the laws of Pennsylvania, owns and operates at Holtwood, Pennsylvania, on the Susquehanna River some nine miles north of the Pennsylvania-Maryland State line a "run-of-river" hydroelectric project under a 50-year license issued in 1931 by the FPC under Part I of the Federal Power Act (R. XVI, 41–42, Order of July 3, 1931 in Project 1881). In addition, Penn Water, in conjunction with Susquehanna, owns and operates transmission lines and associ-

[4] *Pennsylvania Water & P. Co.* v. *Consolidated G., E. L. and P. Co. of Baltimore*, 184 F. 2d 552, 186 F. 2d 934 (C. A. 4); R. XVIII, 1–28, 35–40.

ated equipment located in Pennsylvania and Maryland (R. XVI, 41–42). These transmission lines interconnect with those of Consolidated (the Baltimore electric company) and of Safe Harbor Water Power Corporation (Safe Harbor),[5] by means of which the electric generating facilities of Penn Water, Consolidated and Safe Harbor are interconnected, integrated and operated as a power pool in order to supply their combined loads with maximum over-all economy and maximum coordinated utilization of hydro resources and generating facilities (R. I, 25–27, 69–78). These transmission lines also interconnect with the facilities of Penn Water's Pennsylvania customers, including the Thorndale-Columbia section of the Pennsylvania Railroad (Railroad), and with the facilities of the Potomac Electric Power Company and of the Perryville (Md.)-Benning (D. C.) section of the Railroad (R. XVI, 43).

[5] Safe Harbor is a Pennsylvania corporation which owns and operates under a 50-year license issued in 1930 by the FPC a large "run-of-river" hydro-electric project on the Susquehanna River several miles above Penn Water's project. All of its stock is owned by Penn Water and Consolidated: 100,000 shares of Class A nonvoting stock are owned by Consolidated and 200,000 shares of Class B voting stock are divided equally between Penn Water and Consolidated (R. XVI, 44). Safe Harbor's rates and charges have been held subject to FPC regulation, both as a "licensee" under Part I of the Federal Power Act, and as a "public utility" under the Act's Part II. *Safe Harbor W. P. Corp.*, 5 FPC 221, 231–243, 66 PUR(NS) 212, 222–223, affirmed, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957.

Penn Water has no franchise service area and does not itself sell to the public. In addition to its arrangements with Consolidated (see *infra*), Penn Water has contractual obligations to sell firm electric energy to three electric utilities in Pennsylvania, and to the Railroad for electrified railroad use in Pennsylvania (R. XVI, 45–48).

The Power Pool: Under its power pooling arrangements with Consolidated,[6] which were to remain in effect until April 22, 1980, Penn Water delivers to Consolidated all of the residue of Penn Water's capacity and energy remaining after Penn Water's firm obligations to the three Pennsylvania utilities and the Railroad have been met (R. XV, 4607–4608; XVI, 45). Penn Water, in turn, is entitled to obtain from Consolidated steam-generated energy in excess of Consolidated's own requirements up to the limits of its available generating capacity to enable Penn

[6] Penn Water was also a party, together with Consolidated, to a fifty-year agreement, effective June 1, 1931, with Safe Harbor, the third member of the power pool. Under this contract, Safe Harbor agreed with Consolidated and Penn Water (and the latter *inter se*), that in return for a combined annual payment which would yield to Safe Harbor a specified rate of return after operating expenses (including taxes and depreciation) the latter companies should be entitled to all of the capacity and energy available from Safe Harbor's project in the ratio of two-thirds to Consolidated and one-third to Penn Water (R. XV, 4554–4576; XVI, 45). Under the arrangement, the entitlements are at the disposal of the power pool to permit the maximum utilization of the resources at lowest cost (R. I, 26; V, 2137–2138; XIII, 4369).

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Water to meet its firm power obligations in Pennsylvania (R. XV, 4585; XVI, 45).[7] For the residue, Consolidated pays whatever dollar amount is necessary, in addition to Penn Water's revenues from those customers, to cover all of Penn Water's cost of operation (including taxes and depreciation) and to provide Penn Water with a fair return on investment (R. XVI, 45). The amount Consolidated is to pay is computed in accordance with a formula which includes a credit to Consolidated for its deliveries to Penn Water. The purpose of this arrangement, as stated in Article VIII of the Supplemental Agreement of June 1, 1931, was "to encourage the maximum utilization of the power and energy entitlements and resources and other facilities of the parties * * * to the end that the joint use of this property and equipment shall give the greatest practical benefit to the public" (R. XV, 4613–4614; XVI, 53–54).[8] The contract also contained,

[7] Consolidated's generating facilities, the principal steam-electric resources of the pool, consist now of four steam-electric plants of 585,000 kw. Safe Harbor's generating facilities are exclusively hydro, its plant having an effective capacity of 230,000 kw. Penn Water's generating facilities are principally hydro with an effective capacty of 104,000 kw.; its steam-electric plant has a capacity of only 20,000 kw. (R. XVI, 42, 168).

[8] Article VIII goes on to provide that the parties

"* * * shall so conduct their operations that economic interchange of power and energy during the different hours of the day, the seasons of the year, and over more prolonged periods, shall be encouraged in every possible way" (R. XV, 4614; XVI, 54).

as Articles IV and V (R. XV, 4612–13), the provisions, held unlawful by the Fourth Circuit, that Penn Water could not expand or contract its facilities, or take on new customers without the consent of Consolidated.

Such an arrangement has enabled Penn Water to operate in a manner not otherwise possible because of the unusual nature of its system. Since its hydro plant, which constitutes the bulk of its energy resources, is essentially, a "run-of-river" plant,[9] Penn Water's ability to provide dependable capacity from its own resources is limited by the amount of water available in the Susquehanna River, which "is one of the most variable flow streams of large size in the country." (Tr. III, 1236).[10] Most of the time there is not enough river flow to permit the operation of Penn Water's hydro plant to the full electric capacity of the generators.[11] At times of low flow it does not have sufficient capacity to supply the demands of its customers. Consequently, if dependent solely upon its own generating facilities to supply the firm power loads of its customers, it could not do

[9] Penn Water's hydraulic storage capacity is sufficient only to provide for a weekly cycle of drawdown and refill (R. I, 438–439).

[10] The flow of the river fluctuates widely from a low of 2,100 cubic feet per second to a high of 860,000 cfs (R. I, 39).

[11] The Penn Water hydro plant can utilize a maximum of 31,500 cfs. (Tr. LIX, 22536), with the river flow more often than not being substantially less (Tr. LVIII, 22371; LXVI, 24764).

so (R. V. 2149; Tr. X, 3626). For the periods of low and high flow of the river do not coincide with periodic low and high demands for electric energy, which characteristically occur in daily, weekly and yearly cycles, each with its own peak;[12] since electric energy cannot feasibly be stored, all demands must be satisfied by capacity capable of producing electric energy instantaneously as customers switch on their lights, motors, and other appliances.

Moreover, if operated independently, Penn Water could not have made the most effective utilization of the potential resources of the river nor could it have obtained the maximum economy of generation (R. I, 25, 74–75, 440–441). Penn Water's inability to impound water during high flow months for use in subsequent low flow months, and the frequent recurrence of low river flows, limits its dependable capacity (R. I, 413; V, 2212–2216; XVI, 165–166). These physical limitations, plus the excessive capital investment required for producing the relatively small de-

[12] Daily peaks are usually in midmorning or midafternoon when industrial activity is highest, or in the early evening hours when residential use overlaps commercial and industrial uses. Weekly peaks usually occur in the first five working days of the week; weekly lows on week ends (and holidays). Yearly peaks usually occur in winter when darkness falls before the close of the working day, and frequently during the pre-Christmas period, when unusually high commercial and residential uses coincide with high industrial use (R. I, 42; Tr. LXV, 24222).

pendable output,[13] would preclude Penn Water, if operated independently, from competing successfully with steam plants and substantial water would have to be wasted over the spillways at times of high flow (R. I, 25; Tr. III, 1236).

Under the power pool arrangements worked out by Penn Water and Consolidated, Penn Water's hydro facilities have been integrated into a system which has steam generating facilities and supplies a large utility load (R. I, 32–33, 439); this results in the most effective and economic use of Penn Water's hydro resources. Penn Water has been able to take on firm obligations and to meet them through the availability of power from Consolidated's steam-generation plants (R. V, 2397), which normally are capable of producing up to their full capacity;[14] in times of severe water shortage, Consolidated

[13] Since the continuous output of the Penn Water plant at low water (2,100 cfs) is only about 8,500 kw.; the investment per kw. would be $3,897, compared to an average investment of $316 per kw. for electric plant in service of companies whose electric operating revenues are more than $250,000 per year. R. XVI, 186; Tr. III, 1236; *Statistics of Electric Utilities in the United States* (Federal Power Commission 1950), p. xxi.

[14] Steam plants, not shut down for emergency or for scheduled maintenance, are usually capable of producing up to their full capacity at all times, including peak-load periods (R. VI, 2455), and usually are used in the order of their efficiency—the newer, larger, more efficient units being used most continuously (base-load operations), the less efficient units being put into operation for shorter periods as the load increases (peak-load operation) (R. I, 23, 36–37, VI, 2455).

carries the main burden of supplying Penn Water's customers (R. XIV, 4405; XVI, 175).

In addition, during periods of low river flow, Penn Water's hydro plant is shut down during daily and weekly off-peak load hours to permit water to accumulate. The steam plants of the pool are utilized to carry the load during such periods. Then during peak-load hours, the hydro plant is operated at full capacity for a few hours using the water which has accumulated during the period of nonuse (R. I, 37, 439; VI, 2455; Tr. LIII, 20137). Through such peaking operation, its hydro plant is used to the best advantage by contributing its maximum generating capacity to the system during peak-load hours when maximum capacity is needed and by saving the costs of using the oldest and most inefficient steam plants which would otherwise be used (R. I, 38-42; VI, 2455).[15] On the other hand, when the river flow is high, the hydro plant is operated around the clock to carry the base load of the pool in substitution for steam-generated energy, thereby reducing the amount of fuel which would otherwise have to be burned and minimizing the

[15] The availability of the hydro energy avoids the installation of additional steam capacity and the necessity of keeping existing boilers banked and ready for use (R. I, 24, 38), which would involve standby losses and the operation of turbo-generators below their most efficient loadings. The hydro capacity is also instantly available, coming from standstill to full load in a fraction of a minute (R. I, 42).

waste of water (R. I, 36–37, 40, 75; VI, 2455; Tr. III, 1236, 1246–1247).[16]

Since, under the system thus evolved, Penn Water's hydro facilities are integrated with the generating facilities of Consolidated as well as Safe Harbor, the energy used to satisfy demands of customers of either is determined on the basis of maximum utilization and economy (*i. e.*, river flow, relative costs of steam generation, and magnitude of loads) (R. I, 40; II, 599–600; XVI, 181). As a result, the flow of energy is generally south from Pennsylvania toward Maryland at all times during the spring months when the river is high (R. I, 341). During the rest of the year, the practice is to generate energy at Penn Water's hydro plants so as to assist Consolidated in carrying its peak loads during the day, but to stop hydro generation so as to allow the ponds to refill during off-peak periods (R. I, 45–46, 439). And, although at such times the flow of energy tends to be to the north, from Baltimore to Pennsylvania, the direction of flow on the lines crossing the State boundary may change frequently according to the needs of the consumers in Pennsylvania or Maryland (R. I, 341; II, 599–600; VI, 2455; XVI, 54; Tr. LXVI, 24733).

[16] The purpose of the residual type of payment provided in the contract (*supra*, p. 8) was to free and direct the entire pecuniary motivation to the achievement of the maximum over-all economy of operation and utilization of available resources and facilities, without artificial restrictions due to contractual prices or otherwise (R. I, 25–27, 69–78).

The FPC's order of January 5, 1949: On September 1, 1944, having received petitions from the Mayor and City Council of Baltimore, Maryland and from the Public Service Commission of Maryland (Maryland Commission) (R. XV, 4623, 4731–33),[17] the FPC instituted an investigation into the reasonableness of the rates and charges made by Penn Water for its interstate sales of electrical energy at wholesale, including its sales to Consolidated (R. XVI, 31).[18] After extensive hearings in which Consolidated and the Maryland and Pennsylvania Commissions actively participated as intervenors (R. I, 2; XVI, 31–37), the FPC on January 5, 1949, issued its opinion and order (R. XVI, 39–191).

After reviewing the operations of the power pool, the FPC found that since all of the resources of the pool are available to meet the combined load of its members, without reference to

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[17] The importance of the interstate rates to Consolidated's retail rates to consumers, which were at the time the subject of a Maryland Commission rate proceeding, is referred to by that commission in its opinions in its investigation. *Re Consolidated Gas Electric Light and Power Company of Baltimore*, 61 P. U. R. N. S. 94, 102–103; *id.*, 67 P. U. R. N. S. 144, 149–150.

[18] The FPC simultaneously and on the same petitions initiated a separate investigation of the rates charged by Safe Harbor Water Power Corporation to Consolidated, and after hearings, on November 4, 1946, ordered a reduction of about $627,551 annually. *Safe Harbor W. P. Corp.*, 5 F. P. C. 221. Upon review, the Court of Appeals for the Third Circuit affirmed the order. *Safe Harbor W. P. Corp.* v. *FPC*, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957.

state boundaries, the pool was an "integrated and coordinated interstate electric system." (R. XVI, 51). The FPC further found that the sales of system energy, such as those by Penn Water to its Pennsylvania utility customers, made without reference to the state of origin of the energy, were pool sales, and hence, in light of the interstate nature of the pool, were sales in interstate commerce (R. XVI, 55). The FPC accordingly concluded that Penn Water is a "public utility" under Part II of the Federal Power Act by virtue of its ownership and operation of facilities for the transmission and sale at wholesale of electric energy in interstate commerce, and that its sales for resale to Consolidated, as well as to its three Pennsylvania customers, are subject to Commission jurisdiction under Section 206 (a) of the Act (R. XVI, 56).[19]

In addition, the FPC found that it had jurisdiction to regulate Penn Water under Section 20 of Part I, which relates *inter alia* to rates of licensees whose power enters interstate commerce, since, as it found, the States were "unable to agree" on these rates (R. XVI, 58). The FPC further found that Penn Water's status as a licensee under Part I does not exempt it from regulation under Part II and that no conflict resulted in the pending case from regulation under both Parts (R. XVI, 59).

[19] The FPC did not assert jurisdiction over Penn Water's sales to the Railroad (R. XVI, 51).

In determining just and reasonable rates, the FPC found Penn Water entitled to a return of $1,300,672, computed on a "fair and reasonable rate of return" of 5¼% on a proper rate base, which the FPC found to be $24,774,712[20] (R. XVI, 186). This 5¼% rate of return was allowed since, under the arrangements with Consolidated which the FPC directed be continued as "the most practicable under the circumstances" (R. XVI, 175), Penn Water was assured a stabilized income as in the past (R. XVI, 147).

Since Penn Water's net operating income exceeded a fair return by $1,954,261, the FPC undertook to determine "a reasonable and proper allocation of the cost of service rendered by Penn Water" (R. XVI, 175, 186). On the basis of that allocation, which the FPC grounded on the representative costs of Penn Water's services, which the FPC directed to be continued, to its Pennsylvania customers and to Consolidated, the FPC ordered Penn Water, effective February 1, 1949, to file tariffs which would reduce its rates to its Pennsylvania customers by the aggregate sum of $220,943 and to Consolidated by a reduction of $1,733,318 in Consolidated's residual payments (R. XVI, 174–175, 187, 189–90).[21]

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[20] This rate base consists of gross investment of $33,426,585 plus working capital of $650,000 less accrued depreciation of $9,001,873 (R. XVI, 186).

[21] The FPC formula differed from that provided for in the contract in the following particulars, among others: The

Petitioners sought rehearing of this rate reduction order of January 5, 1949, on the ground, among others, that the contract between Penn Water and Consolidated, particularly Article IV and V, violated the antitrust laws (R. XVI, 206), and consequently that the FPC findings as to jurisdiction, rate of return and allocation, were invalid (R. XVI, 206, 208, 236, 248, 249, 330–331, 332). In so urging, petitioners referred to the complaint filed in December 1948, by Penn Water against Consolidated in the United States District Court for the District of Maryland in which Penn Water sought a declaratory judgment that the contract was invalid under the antitrust laws (R. XVI, 207). The FPC denied the petitions for rehearing with the comment (R. XVI, 378):

> If there are questions as to the legality of the foundation contracts which are in litigation, as [petitioners'] application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions.

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rate of return was reduced from 7% to 5¼%; the rate base to which the 5¼% was to be applied was changed from an undepreciated rate base to a rate base computed by deducting accrued depreciation from gross investment and including working capital; the method of computing the annual allowance for depreciation was changed from a sinking-fund depreciation method to the straight line method, thereby increasing the annual allowance (R. XVI, 186–7; R. XVII, 58–62; Tr. III, 1136–8, 1159–60; R. XV, 4608–12, 4617–21).

Following the FPC's denial of a second petition for rehearing, Penn Water, on April 22, 1949, and the Pennsylvania Commission, on April 25, petitioned the court below for review of the FPC's January 5 order.

The FPC's order of October 27, 1949: Thereafter, on May 31, Penn Water filed with the FPC rate schedules purportedly in compliance with the January 5 order (R. XVII, 27–45). On October 27, the FPC, rejected these schedules after finding that they did not comply with the January 5 order in several respects. The FPC prescribed schedules which it found would effectuate the requirements of its order, and directed the continuance of only those provisions of the Penn Water-Consolidated contract which were "in and of themselves lawful" (R. XVII, 46–47, 62).[22] After denial of its application for rehearing of this order, Penn Water filed in the court below an additional petition seeking review of this order (R. XVII, 1–10).

The proceedings below: While these cases were pending in the court below, petitioners moved the court to annul the FPC's orders on the ground that essential factual and legal support for these orders had been destroyed by the decision

[22] These rate schedules were to be effective in accordance with the terms of an order of the court below, issued on April 29, 1949, which stayed their effective date pending final decision on the condition that Penn Water segregate in a special reserve the amount of the prescribed rate reduction.

rendered by the Court of Appeals for the Fourth Circuit in Penn Water's private antitrust action against Consolidated (*supra*, pp. 5, 17) (R. XVIII, 1–28).[23] The court below, however, denied the motions to annul. It construed the Fourth Circuit decision—

> as having done no more than declare illegal under the antitrust laws certain restraints exercised by [Consolidated] upon Penn Water—such as requiring its approval before it could take on new customers or expand generating facilities. Those restraints had been privately agreed upon by the parties and submitted to the Commission as an accomplished fact. The court was careful to avoid using language which might be interpreted in such a fashion as to affect any rate proceeding * * * [R. XVIII, 53–54].

Accordingly, the court stated (R. XVIII, 54):

> In our view, the Fourth Circuit's opinion neither purported to nor did relieve Penn Water from its obligation under the Federal Power Act to continue the then-existing services and rates. It is those services and rates, reflecting underlying operations, which were the subject of the Commission's order. "A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in viola-

[23] The Fourth Circuit's decision reversed the ruling of the District Court for the District of Maryland holding that the contract was valid. *Pennsylvania Water & P. Co.* v. *Consolidated G. E. L. & P. Co. of Baltimore*, 89 F. Supp. 452.

> tion of the Anti-Trust Act. What rates are legal is determined by" the regulatory statute [citing *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 162]. The validity of Commission action in this proceeding must be determined in light of the criteria furnished by the Federal Power Act, as applied to the operations and arrangements under scrutiny.

As to petitioners' attacks on the jurisdictional basis of the FPC orders, the court held that Penn Water was part of an "integrated and coordinated interstate electric system", that its sales to its Pennsylvania customers were in interstate commerce, and that consequently it was a public utility under Part II of the Federal Power Act, with its rates for those sales subject to regulation under that Part (R. XVIII, 61–64). The court also ruled *inter alia* that the fact that Penn Water is a licensee under Part I, does not prevent it from also being regulated as a public utility under Part II (R. XVIII, 57–60), and further that since there was substantial evidence to support the finding that the Maryland and Pennsylvania Commissions were "unable to agree," the FPC was also authorized to regulate Penn Water's wholesale interstate rates as a licensee under Section 20 of Part I (R. XVIII, 60–61).

On the merits, the court ruled that the FPC's findings were supported by substantial evidence (R. XVIII, 64–72) and, accordingly, it affirmed (R. XVIII, 72).

ARGUMENT

(1) The principal basis for certiorari in these cases arises from the fact that in its opinion of January 3, 1952, in the second *Consolidated* case,[24] the Fourth Circuit has stated that it disagreed with the view expressed by the court below that the Federal Power Act authorizes the Federal Power Commission to prescribe arrangements which would otherwise be in violation of the antitrust laws. The question upon which the courts have differed is doubtless an important one—although since the enactment of the Federal Power Act it seems never to have arisen except in the two recent cases involving the Penn Water-Consolidated contracts. The Government's position on this question is that at least where the Federal Power Commission lawfully prescribes an arrangement requiring integrated operation of power companies, action in compliance with the Commission's order would not violate the antitrust laws. Cf. *Parker* v. *Brown*, 317 U. S. 341. The only question presented in such circumstances is the scope of the Commission's statutory authority.

These cases, however, may not present an appropriate vehicle for this Court to consider and determine the question upon which the courts of

[24] *Consolidated Gas Electric Light and Power Co. of Baltimore* v. *Pennsylvania W. & P. Co.* (C. A. 4), decided January 3, 1952.

appeals have disagreed. For the conflict with the Fourth Circuit would arise only if the Federal Power Commission *has* prescribed arrangements found by that court to violate the Sherman Act. Here, as we shall show, the Commission has not issued any such order; it has not required the companies to perpetuate any contractual provision found unlawful by the Fourth Circuit. Furthermore, neither of the Fourth Circuit's opinions expresses disagreement with the alternative ground for the decision of the court below (quoted at pp. 19–20, *supra*), that nothing in the antitrust or Pennsylvania laws warranted relieving Penn Water of its obligation to continue the then existing services at the reduced rates fixed by the Federal Power Commission,[25] which was the principal object of the Commission's order. Thus, on the present record, it seems highly unlikely that this Court will reach the issue of law upon which the two courts of appeals have disagreed.

The Fourth Circuit in the first *Consolidated* case held violative of the antitrust laws only the provisions of the contract (Articles IV and V) which prohibited Penn Water from making new sales or purchases of electric energy and from expanding its generating facilities without Consolidated's approval (R. XVIII, 7 *et seq.*; see

[25] Petitioners do not assert in this Court that the Federal Power Commission's order reducing rates is not supported by substantial evidence.

also R. XVIII, 25).[26] That court did not hold illegal the provisions as to power pooling and the residual payment type of rate.[27] And, although it went on to invalidate the entire contract, which, of course, included these provisions, it did so not because it regarded the latter provisions as illegal in and of themselves, but rather because, in its view, Articles IV and V were such inseparable parts of the agreement that the remainder could not operate as a contract between the parties without these Articles (R. XVIII, 37).

The FPC's opinions and orders do not prescribe the continuance of any provisions found unlawful. For the FPC's order expressly limited

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[26] The Fourth Circuit expressly stated (R. XVIII, 7):

"The restrictions which are imposed upon the activity of Penn Water by the agreement and give rise to the contention of invalidity are contained in Articles IV and V * * *." Its decision in the second *Consolidated* case is similarly limited. Slip Op., pp. 3–4.

[27] In its opinion in the second *Consolidated* case (Slip Op., p. 5) the Fourth Circuit removed any possible doubt as to its holding in the first case by summarizing the contract as follows:

"This [the Penn Water-Consolidated contract] provided in effect that Consolidated should be entitled to all the electric capacity and energy available to Penn Water from its plant at Holtwood on the Susquehanna and from Safe Harbor, and in return Consolidated agreed to pay Penn Water an amount equal to its operating expenses and a specified rate of return on Penn Water's invested capital; *and then followed* the illegal restrictions upon the activities of Penn Water * * *." [Italics supplied.]

its scope to contractual provisions, "in and of themselves lawful" (R. XVII, 62)—a phrase included in the order after Penn Water had presented to the Commission its contention that portions of the contract were unlawful under the antitrust laws and had called attention to the fact that the issue was then pending before the District Court in Maryland in the first of the antitrust suits against Consolidated (R. XVI, 206–7). The obvious purpose of this phrase was to insure that the Commission's order would not be construed as having approved any provision which the courts might find to be unlawful.[28]

Indeed, both courts of appeals seem to agree that the Commission did not prescribe the restrictive Articles which the Fourth Circuit found unlawful. In the second *Consolidated* case, the Fourth Circuit declared that (Slip Op., p. 15)[29]—

> It is obvious that the Commission did not prescribe the restrictive conditions of the

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[28] Penn Water's assertion (Pet. in No. 428, pp. 11–12), that the phrase "in and of themselves lawful," could not have any relationship to the Fourth Circuit's ruling on Articles IV and V, ignores these facts, which show that the FPC, even prior to the Fourth Circuit's ruling, was aware of the possible illegality of these provisions.

[29] Before the Fourth Circuit in the second case, the Power Commission had contended that its order there involved, unlike its order in the instant case, *had* prescribed the restrictive contractual arrangements in issue. The court's holding in response to this contention that the Commission could not prescribe what the antitrust laws prohibit was an alternative ground of its decision (Slip Op., p. 15, *et seq.*).

> contract as part of the rate order in either case * * *.

The court below, although holding that the Commission possesses power to do so, has not said that it has prescribed the restrictive conditions; on the contrary it differentiated between the "restraints * * * privately agreed upon by the parties and submitted to the Commission as an accomplished fact" and the "services and rates, reflecting underlying operations, which were the subject of the Commission's order" (R. XVIII, 54).

As the Fourth Circuit indicated in its decision in the second *Consolidated* case (Slip Op., pp. 14–15), the Commission's orders were directed to the continuance of the arrangements as to power pooling and the residual-payment type of rate (R. XVI, 175, 378–9), which the Fourth Circuit in neither case found to be in violation of the antitrust laws.[30] The Commission's conclusions as to rate of return, interstate commerce and allocation of the rate reduction were based on the continuance of the arrangements as to power pooling and the residual-payment type of rate. Although Penn Water had contended that this

[30] The FPC's purpose in requiring the continuance of the residual-payment type of rate was to encourage the most effective operation of the power pool. The testimony of Penn Water's own officers had clearly demonstrated that, contrary to Penn Water's present claim (Pet. in No. 428, p. 26, fn), the full benefits of the power pool could be obtained only by this type of payment (R. I, 25–27, 69–78).

residual type of payment violated the Sherman Act (Br. in first *Consolidated* case, p. 27; Br. in second *Consolidated* case, pp. 25–26, 32–35), the Fourth Circuit did not so hold. It therefore cannot be said that the Commission's decision was predicated on continued operation of the provisions of the contract found to have been illegal.

(2) The foregoing discussion is fully applicable to petitioners' contention (Pet. in No. 428, pp. 30–32; Pet. in No. 429, pp. 26–36) that the decision below is in conflict with the further ruling of the Fourth Circuit that the Penn Water-Consolidated contract violated the laws of Pennsylvania, in that they deprived Penn Water's directors of the powers of management (Pet. in No. 428, p. 31), and destroyed Penn Water's "corporate virility" (Pet. in No. 429, p. 28). Here, also, the Fourth Circuit ruling is limited to Articles IV and V of the contract (R. XVIII, 25, *et seq.*), and as we have shown, *supra*, pp. 23–24, the FPC did not prescribe the continuance of these provisions. Moreover, there is no conflict on this point for the further reason that the court below dealt only with those activities of Penn Water which are subject to regulation under the Power Act, whereas the Fourth Circuit only held that since some of Penn Water's activities in Pennsylvania appeared to be local and not subject to the Federal Power Act, there was room for the operation of Pennsylvania law with respect to some of the company's activities.

(3) Petitioner in No. 429 contends that Penn Water sales to its Pennsylvania customers were not in interstate commerce (Pet. in No. 429, pp. 16–17, 19, 21–25). It cannot be disputed that substantial amounts, and at times all, of the power sold to the Pennsylvania customers comes from Baltimore (R. XIV, 4405). Furthermore, as shown *supra*, pp. 11–13, Penn Water's generating facilities, together with those of Consolidated and Safe Harbor, are operated as an "integrated and coordinated interstate electric system" (R. XVI, 51). The output of that system or pool, part of which is sold to Consolidated and part to Penn Water's customers in Pennsylvania, is peculiarly the interstate product of the integrated system, functioning as a single multi-state electric and economic unit, for the existence and nature of the product are wholly dependent upon the operation of the integrated interstate system. The product Penn Water sells to the Pennsylvania customers is a product which would not be available but for the interstate pool which enables Penn Water to draw on Consolidated's out-of-state steam generators during peak-load hours of low river flow, and would not be available at the actual low production cost involved but for the operations of the interstate pool.

The unique characteristics of the power pool and the nature of the product not only distinguish this case from *Peoples Gas Co.* v. *Public Service Commission*, 270 U. S. 550, and *Lone Star*

Gas Company v. *Texas*, 304 U. S. 224,[31] relied on by the Pennsylvania Commission (Pet. in No. 429, pp. 21–25), but also support the FPC's conclusion, approved by the court below (R. XVIII, 61–64), that these sales are in interstate commerce although at times they involve varying amounts of energy never crossing the State lines (R. XVI, 55). The similar conclusion as to Safe Harbor, the third participant in the pool, has already been approved by the Court of Appeals for the Third Circuit. *Safe Harbor W. P. Corp.* v. *FPC*, 124 F. 2d 800 (C. A. 3); *Safe Harbor W. P. Corp.* v. *FPC*, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957;[32] see, also, *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *Landon*, 249 U. S. 236.

[31] The fact that when the river flow is low Penn Water is unable to meet its maximum Pennsylvania load obligations from Pennsylvania generators further distinguishes the *Peoples Gas* case, which held that the state could require a sale from a pipeline carrying a mixture of out-of-state and in-state gas where the line contained sufficient intrastate gas for the sale. Similarly the *Lone Star Gas* case is further distinguishable inasmuch as the rates ultimately sought to be fixed there were retail rates which, under established principles, are subject to state regulation even though in interstate commerce (*Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23).

[32] In the first *Safe Harbor* case, the Third Circuit pointed out that Safe Harbor is "part of a large integrated interstate electric system" and that its electric output "must be treated as an integrated whole." 124 F. 2d at 802, 807. And in the second *Safe Harbor* case, the Third Circuit again held that Safe Harbor's sales "constitute in fact wholesale sales in interstate commerce" because they are "delivered to an integrated interstate electric system." 179 F. 2d at 185, fn. 9.

(4) The court below properly affirmed the FPC's conclusion that Penn Water's status as a licensee under Part I of the Federal Power Act does not preclude its also being a "public utility," subject to Part II of the Act. This conclusion is not only the same as that reached by the Third Circuit on the same question in the second *Safe Harbor* case, in which this Court declined to review this holding by denying certiorari (Pet. in No. 709, October Term, 1949, pp. 6–19; 339 U. S. 957), but is fully supported by the legislative history of Part II, wherein Congress recognized that its definition of public utilities embraced some licensees and expressly intended that such licensees be regulated as public utilities as well.[33]

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[33] Thus, the House Committee on Interstate and Foreign Commerce deleted the word "licensees" in Section 305 (a)'s prohibition against personal profit by officials and left that prohibition directed solely against public utilities, because it understood that licensees owning or operating Part II jurisdictional facilities would be regulated as public utilities. The Committee commented:

"The Senate bill includes licensees within the provisions of this section, but inasmuch as such licensees when interstate operating public-utility companies will be subject to the provisions of the section in any event, licensees have been omitted from the bill as reported, because of the lack of public interest in those companies which are not public utilities."

H. Rep. No. 1318, 74th Cong., 1st Sess., p. 31; H. Rep. No. 1903, 74th Cong., 1st Sess., pp. 56, 75; see also, Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., on S. 1725, pp. 233–234.

The alleged conflicting dicta in *Niagara Falls Power Company* v. *FPC*, 137 F. 2d 787, 792–793 (C. A. 2), certiorari denied, 320 U. S. 792, and *Alabama Power Co.* v. *FPC*, 128 F. 2d 280, 293 (C. A. D. C.) were urged unsuccessfully as grounds for certiorari in the second *Safe Harbor* case (Pet. in No. 709, October Term, 1949, pp. 7–8, 15–16). On their face they afford little support to Penn Water's theory. Furthermore, a mere reading of the latter two decisions, in both of which the Commission prevailed, will show that the courts were dealing with problems in no way resembling those at bar, and that the statements were made in an entirely different context from that now under consideration.

Nor does the statement below (R. XVIII, 60) as to repeal of Part I by implication from Part II support Penn Water's claim of conflict with the Third Circuit's *Safe Harbor* decisions (Pet. in No. 428, pp. 32–33). The first *Safe Harbor* decision involved no question of regulation under Part II, since there the FPC had not undertaken to exercise its authority under that Part. 124 F. 2d 800 (C. A. 3); see also 179 F. 2d 179, 182. In its second *Safe Harbor* decision, the Third Circuit, in ruling that the company was subject to regulation under both Parts, found it unnecessary to hold that Part II, enacted in 1935, repealed by implication any portion of the earlier Section 20 since it found that the result would be the same under either part; the court indi-

cated, however, that had it been necessary to its decision, it would have so ruled. 179 F. 2d at 185, fn. 10.[34]

The court below also indicated that it did not matter which part was applicable (R. XVIII, 60). In this case, the FPC had proceeded under both Parts I[35] and II, and the standard for fixing rates under both Parts is essentially the same, as both the court below and the Third Circuit have held (R. XVIII, 60; *Safe Harbor W. P. Corp.* v. *FPC*, 179 F. 2d 179, 182–193 (C. A. 3), certiorari denied, 339 U. S. 957; Brief for the Federal Power Commission in Opposition, in No. 709, Oct. Term, 1949, pp. 13–23).

The "careful distinction" "drawn between 'licensees' under Part I and 'public utilities' under Part II" (Pet. in No. 428, p. 33) does not indicate that a company could not be both a licensee and a public utility and so regulable under both Parts; rather, it serves merely to define the provisions applicable to companies which are licensees and not public utilities and *vice versa*. Finally, subjecting Penn Water to regu-

[34] "It would seem to be more accurate to state that certain portions of Parts I and II are inconsistent with each other unless we, or some other court, find a rational reconciliation as we think we have done. If the provisions of the respective Acts cannot be reconciled then the former must be deemed to be repealed by the latter."

[35] The FPC may fix rates for licensees if it finds that the State Commissions are unable to agree on rates. Section 20, 16 U. S. C. § 813. Such a finding in this case was upheld by the court below (R. XVIII, 60–61), and is not challenged here.

lation as a public utility as well as a licensee affect no vested rights of Penn Water as a licensee, since its license was issued after the enactment of Part II in 1935.

CONCLUSION

The judgment below is clearly correct. Since the issue upon which the Fourth Circuit disagrees with the court below would seem not to be presented by the facts of this case, this Court may not deem this an appropriate case in which to consider that question. On the other question there is no conflict in decisions, and no need for certiorari.

Respectfully submitted.

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